

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

TERENCE D. MANNING,

Plaintiff,

v.

STATE OF WASHINGTON; WASHINGTON  
STATE PATROL; Washington State Patrol  
Trooper John Doe Clevenger, Jane Doe  
Clevenger, and their marital community; and  
Trooper Jane DuCommon, John Doe  
DuCommon, and their marital community,

Defendants.

Case No. C05-5791RJB

ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANTS'  
FRCP 37 SUBMISSION FOR A  
MOTION TO COMPEL AND  
MOTION IN LIMINE STRIKING  
LATE DISCLOSED WITNESSES

This matter comes before the Court on Defendants' FRCP 37 Submission for a Motion to Compel and Motion in Limine Striking Late Disclosed Witnesses (Dkt. 41-1). The Court has considered the pleadings filed in support of and in opposition to the motion and the file herein.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

This suit stems from alleged mistreatment of plaintiff Terence D. Manning in the investigation of an alleged misdemeanor. Dkt. 1 at 3. Mr. Manning brought suit in federal court asserting claims of battery; excessive force; violation of the Fourth, Fifth, Eighth, and Fourteenth Amendments; negligence; and deliberate indifference. Dkt. 1.

On July 6, 2006, the Court ordered the plaintiff to submit to an independent medical

1 examination by Dr. Glenn Goodwin. Dkt. 27. The Court denied the plaintiff's request to have the  
2 examination videotaped on the basis of Dr. Goodwin's declaration contending that videotaping  
3 would be disruptive. *Id.* The examination was scheduled for dates set forth in the Court's Order but  
4 was cancelled.

5 The defendants now move for the following relief: (1) an order compelling the plaintiff to  
6 submit to an independent medical examination with a different doctor and an extension of discovery  
7 to accommodate this examination, (2) exclusion of witnesses who were not timely disclosed in the  
8 plaintiff's initial disclosures, and (3) exclusion of expert witnesses who were not properly disclosed  
9 because no expert report has been provided. Dkt. 41-1. The plaintiff objects to the dates for the  
10 medical examination proposed by the defendants; requests that the examination be videotaped;  
11 stipulates to the exclusion of witnesses disclosed August 8, 2006; requests assistance in setting  
12 certain depositions; and moves to strike the declaration and anticipated testimony of Thomas Ovens.  
13 Dkt. 43

## 14 II. DISCUSSION

### 15 A. INITIAL DISCLOSURES

16 Initial disclosures are governed by Federal Rule 26, which provides as follows:

17 [A] party must, without awaiting a discovery request, provide to other parties:

18 (A) the name and, if known, the address and telephone number of each individual  
19 likely to have discoverable information that the disclosing party may use to support its  
20 claims or defenses, unless solely for impeachment, identifying the subjects of the  
information;

21 Fed. R. Civ. P. 26(a)(1)(A). If a party fails to make the requisite disclosures under Federal Rule  
22 26(a), the party is generally prohibited by Federal Rule 37 from using the undisclosed information:

23 A party that **without substantial justification** fails to disclose information required by Rule  
24 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is  
25 not, **unless such failure is harmless**, permitted to use as evidence at a trial, at a hearing, or  
26 on a motion any witness or information not so disclosed. In addition to or in lieu of this  
sanction, the court, on motion and after affording an opportunity to be heard, may impose  
other appropriate sanctions. In addition to requiring payment of reasonable expenses,

1 including attorney's fees, caused by the failure, these sanctions may include any of the actions  
2 authorized under Rule 37(b)(2)(A), (B), and (C) and may include informing the jury of the  
3 failure to make the disclosure.

4 Fed. R. Civ. P. 37(c)(1) (emphasis added). The party may avoid the consequences of nondisclosure if  
5 it demonstrates that the failure to disclose was substantially justified or harmless.

6 In the present case, the initial disclosure deadline was March 2, 2006. Dkt. 3. The plaintiff  
7 filed initial disclosures on April 26, 2006. Dkt. 14. The defendants filed a Motion in Limine to  
8 exclude these witnesses. Dkt. 41-1. The plaintiff contends that this delay was justified by the  
9 Stipulation and Agreed Order to Adjust FRCP 26(a)(2) Disclosure of Expert Testimony Deadline.  
10 Dkt. 21. This extension was expressly limited to disclosures of expert testimony under Federal Rule  
11 26(a)(2) and did not extend the deadline for initial disclosures under Federal Rule 26(a)(1).

12 The plaintiff also contends that the delay is justified by "the agreement of parties disclosed in  
13 the Joint Status Report." Dkt. 43 at 5. The portion of the Joint Status Report, filed *after* the initial  
14 disclosure deadline, to which the plaintiff apparently refers is as follows:

15 b. Initial disclosures are due 3/6/06. Additional time is needed for initial discovery by the  
16 parties. Discovery may be needed with respect to the parties' claims and damages and the  
17 Defendant's defenses.

18 d.[sic] At the present time, there should be no changes made to the limitations imposed on  
19 discovery under Federal and Local Civil Rules. No additional limitations should be imposed.

20 Dkt. 10 at 5. The parties did not move for relief from the initial disclosure deadline, and this language  
21 does not evidence an agreement between the parties to extend the deadline. Pursuant to Federal Rule  
22 37(c)(1), the parties should be afforded an opportunity to be heard as to whether exclusion of  
23 information contained in the plaintiff's tardy initial disclosures, or other sanctions, should be  
24 imposed.

## 25 **B. DISCLOSURE OF WITNESSES**

26 Disclosure of expert witnesses is governed by Federal Rule 26, which provides as follows:

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules

1 702, 703, or 705 of the Federal Rules of Evidence.

2 (B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect  
3 to a witness who is retained or specially employed to provide expert testimony in the case or  
4 whose duties as an employee of the party regularly involve giving expert testimony, be  
5 **accompanied by a written report prepared and signed by the witness.** . . .

(C) These disclosures shall be made at the times and in the sequence directed by the court.

6 Fed. R. Civ. P. 26(a)(2) (emphasis added). In this case, the deadline for disclosing expert witnesses  
7 and expert reports was August 8, 2006. Dkt. 21. The plaintiff filed his FRCP 26(a)(2) Disclosure  
8 with the Court on August 9, 2006. Dkt. 29. As of October 19, 2006, the defendants have not been  
9 provided with a copy of any of the plaintiff's experts' reports. Dkt. 42 at 5. The plaintiff stipulates to  
10 striking of all "medical witnesses disclosed 8/8/06." Dkt. 43 at 4. The Court should therefore hold  
11 that pursuant to Federal Rule 37(c)(1) and the plaintiff's agreement, the plaintiff is not permitted to  
12 use as evidence at a trial, at a hearing, or on a motion any medical witness in the plaintiff's FRCP  
13 26(a)(2) disclosure and the proffered expert witnesses from whom no expert reports were provided.  
14 See Dkt. 29 ("Fact Medical Witnesses"), Dkt. 47 at 9 ("Expert Witnesses").

### 15 C. MOTION TO COMPEL

16 On July 6, 2006, the Court ordered the plaintiff to submit to an independent medical  
17 examination by Dr. Glenn Goodwin. Dkt. 27. The scheduled examination was cancelled, and the  
18 defendants now seek an extension of discovery for the limited purpose of completing the plaintiff's  
19 medical exam. Dkt. 41-1 at 6. The defendants ask that the plaintiff be ordered to submit to an  
20 examination by Dr. Jeffrey Powell<sup>1</sup> on November 21 and November 27, 2006. Dkt. 46-2 at 2. In  
21 response, the plaintiff asks that the examination be videotaped and that the plaintiff be allowed to  
22 depose Dr. Powell. Dkt. 43 at 4. Plaintiff's counsel also contends that he will not be available to  
23 accompany the plaintiff on the proposed dates. Dkt. 44 at 3. In support of the reply, the defendants  
24 offer a declaration of Dr. Powell contending that the presence of a third party or videographer would

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25 <sup>1</sup>The parties refer to the doctor as "Dr. Powell." See, e.g., Dkt. 46-2 at 2, Dkt. 43 at 4. The Court uses the  
26 spelling provided in Dr. Powell's declaration. Dkt. 48.

1 be disruptive. It appears that while the parties have attempted to schedule a mutually agreeable time  
2 for Dr. Powel to conduct a medical examination, they have not specifically discussed the defendants'  
3 proposed dates. The Court should therefore deny the motion to compel without prejudice. The  
4 parties should meet and confer, attempt to resolve discovery and scheduling issues in good faith, and  
5 use conference calls to chambers before filing further discovery motions.

#### 6 **D. EXTENSION OF DISCOVERY DEADLINE**

7 The defendants request an extension of the discovery deadline, currently September 25, 2006,  
8 for the limited purpose the plaintiff's upcoming independent medical examination. Dkt. 41-1 at 6.  
9 The defendants do not propose a specific date on which such discovery should be completed but  
10 propose that two weeks after completion of Dr. Powel's medical examination, Dr. Powel's report  
11 will be provided to the plaintiff and that the plaintiff should be afforded an opportunity to depose Dr.  
12 Powel. The plaintiff did not respond specifically to this request but asks the Court for assistance in  
13 setting dates for depositions, indicating the plaintiff's agreement that discovery should be extended.  
14 The Court should therefore extend the discovery cutoff to accommodate the plaintiff's medical  
15 examination. The date for such extension will be determined after the examination is scheduled.

#### 16 **E. REQUEST TO TAKE ADDITIONAL DEPOSITIONS**

17 In the response, the plaintiff requests the Court's assistance in setting dates to depose  
18 defendants DuCommon and Clevenger. Dkt. 43 at 4. The plaintiff has not moved for such relief, and  
19 the request is not properly before the Court. As indicated above, the discovery deadline in this case  
20 passed more than one month before the response was filed. The plaintiff offers no justification for  
21 failing to move for relief earlier.

22 The plaintiff also seeks to depose the doctor who ultimately conducts the medical  
23 examination, and the defendants agree that this is appropriate. *See* Dkt. 46-2 at 2 (proposed order  
24 allowing for deposition). The Court should extend the discovery deadline to accommodate this  
25 deposition. Until the date for the medical examination is set, the precise extension of the discovery  
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1 deadline cannot be determined.

2 Finally, the plaintiff contends that he would be severely prejudiced if not allowed to depose  
3 Thomas Ovens. Dkt. 43 at 4. The plaintiffs allege that this witness was not disclosed. *Id.* The name  
4 and expert report of this witness were filed with the Court on August 8, 2006, the deadline for  
5 disclosure of expert witnesses. Dkt. 28. The plaintiff offers no justification for failing to depose this  
6 witness before the discovery cutoff.

### 7 **F. MOTION TO STRIKE**

8 The plaintiff moves to strike the anticipated trial testimony and declaration of Thomas Ovens,  
9 which accompanies the Defendants' Motion for Summary Judgment, on the grounds that "Thomas  
10 Ovens was not previously identified as a witness for the State." Dkt. 43 at 5; Dkt. 38 (declaration).  
11 As noted above, Thomas Ovens was disclosed as an expert witness, and this disclosure was timely.  
12 The motion to strike should be denied.

### 13 **III. ORDER**

14 Therefore, it is hereby

15 **ORDERED** that Defendants' FRCP 37 Submission for a Motion to Compel and Motion in  
16 Limine Striking Late Disclosed Witnesses (Dkt. 41-1) is **GRANTED in part** and **DENIED in part**  
17 as follows:

18 (1) On or before November 17, 2006, the parties shall show cause, if any they may have, why  
19 information contained in the plaintiff's initial disclosures should not be excluded from use as  
20 evidence at a trial, at a hearing, or on a motion any witness. The response and reply, if any,  
are due November 20 and November 24, 2006, respectively.

21 (2) With respect to the plaintiff's disclosures under Fed. R. Civ. P. 26(a)(2), the Motion in  
Limine is **GRANTED**.


22 (3) The Motion to Compel is **DENIED**.

23 (4) The parties shall notify the Court on or before November 21, 2006, of the scheduling of  
24 the independent medical examination, at which time the new discovery deadline will be set.

25 (5) The motion to strike contained in the plaintiff's response (Dkt. 43) is **DENIED**.  
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1 The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel of  
2 record and to any party appearing *pro se* at said party's last known address.

3 DATED this 14<sup>th</sup> day of November, 2006.

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5 Robert J. Bryan  
6 United States District Judge  
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